NO. 80-5887

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1980

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SUPREME COURT, U.S.

RICHARD H. WHITE,

Petitioner,

-v-

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,

Respondents.

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SUPPLEMENTAL BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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STATEMENT

In our Petition at pp.8-13, we pointed out that two courts of appeals had held that since fees are defined "as part of the costs" by the Fees Act, 42 U.S.C. §1988, fee requests are not subject to the ten-day limitation in Rule 59(e) of the Fed. R. Civ. P. governing motions to alter or amend a judgment. We also observed that the First Circuit below was the only court of appeals to apply Rule 59(e) to a request for fees under the Fees Act.

Subsequent to the filing of our Petition, no other court of appeals has followed the decision rendered by the First Circuit below. Panel decisions in other courts of appeals, however, have rejected the application of Rule 59(e) to fee requests and thus have disagreed with the position of the First Circuit in this case.

Because of these recent decisions, we submit this Supplemental Brief.

REASONS FOR GRANTING THE WRIT

Following the Fifth Circuit's seminal decision in Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980) -- holding that a request for fees "as part of the costs" under the Fees Act is not governed by Rule 59(e) -- two other panels of the Fifth Circuit have reached the same conclusion. Jones v. Dealers Tractor and Equipment Co., 634 F.2d 180, 181 (5th Cir. 1981); Van Ooteghem v. Gray, 628 F.2d 488, 497 (5th Cir. 1980).

The Seventh Circuit, in a decision which is now reported, has also held that a request for fees under the Fees Act is not governed by Rule 59(e). Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980).

Most recently, the Sixth Circuit followed the position taken in the foregoing decisions, and held that a request for fees under the Fees Act is not governed by Rule 59(e). Johnson v. Snyder, No. 79-3459 (6th Cir. January 23, 1981). A copy of the Sixth Circuit's unreported opinion is attached hereto as Appendix A for the convenience of the Court.

No court of appeals, as noted, has followed the decision of the First Circuit below.

CONCLUSION

For the reasons set forth in our Petition and in this Supplemental Brief, the Petition for a Writ of Certiorari should be granted, and the decision of the First Circuit should be summarily reversed.

Dated: New York, New York
February, 1981

Respectfully submitted,

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APPENDIX A

No. 79-3459

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARY B. JOHNSON,
Plaintiff-Appellee,

v.

RICHARD H. SNYDER and MARION J. SNYDER,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed January 23, 1981.

Before: ENGEL, MERRITT and BROWN, Circuit Judges.

PER CURIAM. Plaintiff, Mary B. Johnson, sued Richard H. and Marion J. Snyder for damages and injunctive relief under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and under 42 U.S.C. § 1981 and § 1982, alleging that the defendants, owners of an apartment building, had refused to show her an apartment for rent because she is black. After a temporary restraining order was issued, Johnson withdrew her application for a temporary injunction when the defendants agreed to show her the apartment. The case ultimately went to trial, and the jury awarded damages in the amount of $1.00.

Thereafter plaintiff, whose complaint prayed for attorney's fees, filed a motion for attorney's fees pursuant to 42 U.S.C. § 1988. At the time this motion for attorney's fees was filed, the judgment on the jury verdict had become final. Plaintiff had not, pursuant to Rule 59(e), Fed.R.Civ.Proc., moved to alter or amend the judgment within ten days after her mo-

tion for a new trial had been denied and had not, pursuant to Rule 4, Fed.R.App.Proc., within thirty days thereafter, filed a notice of appeal.

Defendants contended that the district court had no authority to entertain the motion for attorney's fees. The district court disagreed, and after a hearing, awarded such fees in the amount of $8,000.00 and costs of $118.06. 470 F.Supp. 972 (N.D. Ohio, W.D. 1979). Defendants have appealed, contending, again, that the motion for attorney's fees came too late and that, in any event, the amount awarded constituted an abuse of discretion.

We conclude that, as to the amount of the fees, such did not amount to an abuse of discretion; the award was based upon compensation at the rate of $50.00 per hour for the time consumed by the attorneys.

Defendants contend that the motion for attorney's fees came too late because plaintiff did not timely file motion to alter or amend judgment or a notice of appeal.

On this issue, we agree with the holdings of the Fifth Circuit in *Knighton* v. *Watkins*, 616 F.2d 795 (1980), and *Van Cotteghem* v. *Gray*, 623 F.2d 488 (1980), that attorney's fees awarded under § 1988 are awarded as costs and are not controlled by the time limitations that defendants here assert. We recognize that the First Circuit in *White* v. *New Hampshire Department of Employment Security*, 629 F.2d 697 (1980), refused to follow *Knighton*, *supra*, but we conclude that *Knighton* is the better reasoned opinion.

The judgment of the district court is therefore affirmed.